

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANGELA M NEGUS,

Plaintiff,

v.

CAROLYN COLVIN,

Defendant.

CASE NO. C14-559 MJP

ORDER ON REPORT AND
RECOMMENDATION

The above-entitled Court, having received and reviewed:

1. Report and Recommendation (Dkt. No. 16),
2. Plaintiff's Objections to Magistrate's Report and Recommendation (Dkt. No. 17),
3. Defendant's Response to Plaintiff's Objections to Magistrate's Report and
Recommendation (Dkt. No. 18),

and all relevant exhibits and declarations (as well as the Administrative Record), rules as follows:

1 IT IS ORDERED that the Report and Recommendation is PARTIALLY ADOPTED: the
 2 Court will credit as true the improperly discounted evidence from Plaintiff's treating physicians
 3 and from Plaintiff herself.

4 IT IS FURTHER ORDERED that the matter is REMANDED for an immediate award of
 5 benefits.

6 **Background**

7 Plaintiff was a 48-year old female at date of onset; 51 years old when the decision
 8 rejecting her claim was made. The Administrative Law Judge ("ALJ") found that she had severe
 9 impairments of diabetes with peripheral neuropathy, obesity, attention deficit hyperactivity
 10 disorder ("ADHD"), major depressive disorder and anxiety disorder, but that these were
 11 insufficient to meet a Listing. The ALJ found that Plaintiff had the Residual Functional Capacity
 12 ("RFC") to perform light work with limitations, and that there were jobs that existed in
 13 substantial numbers in the economy that she could perform. On that basis, the ALJ found
 14 Plaintiff "not disabled." (AR 34.)

15 **Discussion/Analysis**

16 **Report & Recommendation**

17 In recommending that the ALJ's decision be reversed and remanded for further
 18 determinations and a new decision, the Magistrate Judge assigned error to two aspects of the
 19 ruling:

20 **1) Evidence from treating physicians improperly rejected**

21 The findings of Plaintiff's consulting medical doctor (that the symptoms in her lower
 22 extremities were "compatible with diabetic neuropathy;" AR 274) and resulting opinions (that
 23 she could perform light work with a maximum of two hours of standing and walking; AR 275)
 24 were rejected by the ALJ in favor of the opinions of two nonexamining State agency medical

1 consultants who disagreed with the level of impairment and found Plaintiff capable of longer
2 periods of standing and walking. (AR 31-32.) The findings of the doctor who performed a
3 psychological exam on Plaintiff (that Plaintiff suffered from ADHD, depression and anxiety,
4 would have difficulty performing detailed and complex tasks, accepting instructions and working
5 with the public and other co-workers; AR 281-82) were given little weight because they
6 conflicted with the ALJ's personal observations of Plaintiff's demeanor and apparent abilities.
7 The ALJ instead gave greater weight to the opinions of two nonexamining State agency
8 psychological consultants who believed that Plaintiff could maintain concentration, persistence
9 and pace for unskilled, less complex tasks and was capable of working with the public. (AR 32.)

10 The Magistrate Judge faulted the ALJ for failing to consider the examining physician's
11 opinion in light of objective medical evidence of foot pain and neuropathy and relying instead on
12 the opinion of nonexamining experts when there was no independent medical evidence to
13 support their conclusions. The ALJ discounted the psychological exam results as too reliant on
14 what she considered to be the unreliable subjective testimony of Plaintiff. But the Magistrate
15 Judge found that the psychological opinion of the examining physician was based on the doctor's
16 own observations as well as Plaintiff's personal report; furthermore, a psychological examination
17 after the ALJ's decision corroborated the opinion of the examining doctor even further.

18 **2) Plaintiff's credibility improperly assessed**

19 The ALJ found that Plaintiff's testimony lacked credibility because her reported
20 symptoms were inconsistent with the medical evidence, because she had not sought treatment
21 and because her daily living activities were incongruent with her allegations of disability. The
22 Magistrate Judge disagreed with every one of these grounds, finding that (a) there was objective
23 medical evidence supporting her reported symptoms, (b) her lack of treatment was explained by
24

her destitute financial situation and corresponding absence of insurance and (c) her daily living activities were entirely consistent with the allegations of disabling impairments. As a result, the Magistrate Judge found that the reasons given by the ALJ for discounting Plaintiff's testimony were neither clear and convincing nor supported by substantial evidence.¹

Based on his conclusions, the Magistrate Judge was faced with choosing whether to recommend remanding for the taking of further evidence and reevaluation in light of this ruling or simply remanding for an award of benefits under the credit-as-true rule.

This is a discretionary decision; remanding for an award of benefits under the credit-as-true rule is generally followed when three criteria are satisfied:

(1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand.

Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014). The Magistrate Judge found that the impact of crediting the evidence that Plaintiff can only walk/stand two hours a day and has significant mental impairments is "unclear." (Dkt. No. 16, R&R at 13.) As a result, he recommended that the case be remanded for further proceedings, with the ALJ ordered to credit as true the opinions of the two examining physicians and Plaintiff's testimony and recalculate her RFC accordingly. (Dkt. No. 16, R&R at 13.)

Responsive briefing

As mentioned, the Attorney General does not even contest the R&R's conclusion that the ALJ improperly ignored the consulting physicians' findings and improperly discredited

¹ Significantly, the Attorney General's briefing does not take exception with the Magistrate Judge's assignment of errors to the underlying administrative proceedings.

1 Plaintiff's testimony. The entire defense brief is dedicated to convincing the Court to (1) not
 2 employ the "credit-as-true" rule and (2) simply remand and allow the ALJ to reevaluate whether
 3 Plaintiff is disabled based on the entire record. Plaintiff argues for adopting the credit-as-true
 4 rule in accordance with the R&R and remanding for benefits alone based on the Garrison test.

5 The Court finds that Plaintiff has the better argument and will exercise its discretion and
 6 credit the testimony of both the examining physicians and Plaintiff as true, based on the standard
 7 announced in the Ninth Circuit:

8 In cases where there are no outstanding issues that must be resolved before a
 9 proper disability determination can be made, and where it is clear from the
 10 administrative record that the ALJ would be required to award benefits if the
 11 claimant's excess pain testimony were credited, we will not remand solely to
 12 allow the ALJ to make specific findings regarding that testimony. Rather, we will
 13 . . . take that testimony to be established as true.

14 Reddick v. Chater, 157 F.3d 715, 728 (9th Cir. Cal. 1998); *see also* Vasquez v. Astrue, 572 F.3d
 15 586, 593 (9th Cir. Cal. 2009).

16 The Court is unconvinced that there are further outstanding issues to be developed. The
 17 Attorney General hints vaguely that "[o]n remand, additional evidence will likely be added to the
 18 record" (Dkt. No. 18, Def's Response, p. 3), but provides no support for this assertion,
 19 including no indication of why additional evidence would need to be added to the record.

20 Additionally, it appears conclusively that an award of benefits is required once the
 21 discredited testimony is deemed true. The ALJ declared Plaintiff fit for "light work" under the
 22 RFCs originally found by her. The CFRs describe the following functional requirements for
 23 "light work:"

24 Light work involves lifting no more than 20 pounds at a time with frequent lifting
 or carrying of objects weighing up to 10 pounds. Even though the weight lifted
 may be very little, a job is in this category when it requires a good deal of walking
 or standing, or when it involves sitting most of the time while pushing or pulling

1 arm or leg controls. To be considered capable of performing a full or wide range
2 of light work, you must have the ability to do substantially all of these activities.

3 20 C.F.R. § 404.1567(b).

4 Once the rejected testimony is credited, it is clear that Plaintiff does not have the ability
5 “to do substantially all of these activities.” Her restriction to two hours of walking or standing
6 does not equate to a requirement of “a good deal of walking or standing,” and her diabetic
7 neuropathy and foot pain preclude her from pushing or pulling leg controls. The impact of these
8 limitations is not “unclear”: Plaintiff does not have the ability to do “light work” as defined in
9 the CFRs.

10 The next available category of work is “sedentary work,” defined in the CFRs as:

11 **(a) Sedentary work.** Sedentary work involves lifting no more than 10 pounds at
12 a time and occasionally lifting or carrying articles like docket files, ledgers,
13 and small tools. Although a sedentary job is defined as one which involves
sitting, a certain amount of walking and standing is often necessary in
carrying out job duties. Jobs are sedentary if walking and standing are
required occasionally and other sedentary criteria are met.

14 20 CFR § 404.1567.

15 Plaintiff refers the Court to the Medical-Vocational Guidelines (also known as the
16 “Grids”), “a matrix system for handling claims that involve substantially uniform levels of
17 impairment.” (Dkt. No. 17, Plaintiff Obj’ns, at 3-4; *see also* 20 C.F.R., Part 404, Subpt P., App.
18 2.) The Grids are to be used only where they “completely and accurately represent a claimant’s
19 limitations.” Tackett v. Apfel, 180 F.3d 1094, 1101 (9th Cir. 1999); Lounsbury v. Barnhart, 468
20 F.3d 1111, 1115 (9th Cir. 2006). The ALJ is mandated, at step five, to find other jobs that a
21 claimant can perform (Valentine v. Comm’r of Soc.Sec.Admin., 574, F.3d 685, 589 (9th Cir.
22 2009)) – when the claimant’s limitations are both exertional and non-exertional (which is
23
24

1 certainly the case with Plaintiff), the ALJ must consult the Grids first. Lounsbury, 468 F.3d at
 2 1115.

3 As the analysis above shows, Plaintiff is limited to (at best) sedentary work. Table No. 1
 4 of the Grids covers “Residual Functional Capacity: Maximum Sustained Work Capability
 5 Limited to Sedentary Work as a Result of Severe Medically Determinable Impairments.”
 6 (20 C.F.R., Part 404, Appendix 2.). The table divides claimants by age, education and previous
 7 work experience – Plaintiff falls into those categories as follows:

- 8 1. Age = “Closely approaching advanced age”²: Plaintiff was 51 at the time the ALJ’s
 9 decision was published.
- 10 2. Education = “Limited or less” (i.e., no high school diploma): Plaintiff has an 8th
 11 grade education. (AR 83.)
- 12 3. Previous work experience = “Unskilled or none”: Plaintiff’s entire work history
 13 consists of unskilled labor; she has no transferable work skills. (AR 86.)

14 This places Plaintiff in Rule 201.09 of the Table No. 1 grid and leads to an automatic finding of
 15 disability.

16 Further, crediting as true the “non-exertional” limitations described by the psychological
 17 testimony (AR 281-82) and Plaintiff’s own testimony – anxiety, panic attacks, depression,
 18 problems with memory and concentration (AR 215, 219, 231) – leads to the conclusions of
 19 unemployability reached by the vocational expert (“VE”) who testified at Plaintiff’s hearing.
 20 Faced with hypotheticals describing a worker unable to maintain concentration and “off task
 21 20% or more of the work period,” the VE testifies that there would be no work for such an

22 ² “Person closely approaching advanced age. If you are closely approaching advanced age (age 50-54), we will
 23 consider that your age along with a severe impairment(s) and limited work experience may seriously affect your
 24 ability to adjust to other work.” 20 CFR § 404.1563(d)

1 individual. (AR 86.) The VE reaches a similar conclusion regarding a worker who is absent 2-3
2 times a month (the examining doctor had said that Plaintiff would had difficulties with
3 attendance based on her anxiety, panic attacks and depression; AR 282). (AR 86.)

4 **Conclusion**

5 The Court agrees with the Magistrate Judge that the testimony of the two examining
6 doctors and Plaintiff's own testimony should be credited as true. The Court also agrees with
7 Plaintiff that crediting that evidence leads to an automatic finding of disability. On that basis, the
8 Court remands to the ALJ for an award of benefits.

9
10 The clerk is ordered to provide copies of this order to all counsel.

11 Dated this 3rd day of April, 2015.

12
13
14 

15 Marsha J. Pechman
16 United States District Judge
17
18
19
20
21
22
23
24